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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S REPLY TO DEFENDANT'S OPPOSITION TO STATE'S MOTION TO QUASH SUBPOENAS DUCES TECUM** **(The Honorable Warren Darrow)**

The State of Arizona, through undersigned counsel, hereby replies to Defendant's Opposition to State's Motion to Quash Subpoenas Duces Tecum. The reasons in support of this motion are more fully set forth below.

MEMORANDUM OF POINTS AND AUTHORITIES

LEGAL ARGUMENT:

1. The underlying issue raised in the State's Motion to Quash Subpoenas Duces Tecum is not moot.

When the State was notified of the subpoenas received by the medical examiners' offices, it requested the subpoenas be withdrawn. Defendant's counsel refused to do so. After Defendant realized the State had disclosed essentially all of the records sought, he requested the State withdraw the motion to quash as moot. When the State agreed to withdraw the motion if

Defendant would agree to not issue any further subpoenas duces tecum without an appropriate court order pursuant to Rule 15.1(g), Ariz. R. Crim. P., Defendant refused to do so and reiterated his opinion that subpoenas duces tecum are an appropriate and authorized form of discovery in an Arizona criminal case. Accordingly, the issue raised in the State's motion is only forstalled, and not moot, in light of Defendant's contention which implicitly indicates his intent to issue additional subpoenas duces tecum in the future.

Moreover, in Thomas Kelly's Affidavit to this Court, he declares he routinely issues subpoenas duces tecum for discovery in his criminal cases. It is the State's position, supported by the plain language of A.R.S. § 13-4071, Rule 15.1(g), Ariz. R. Crim. P., and *Carpenter v. Superior Court,* 176 Ariz. 286, 862 P.2d 246 (App. 1993), that this practice is not authorized. Attached as Exhibit A is a 2008 Arizona Supreme Court Disciplinary Commission Report, 2008 WL 6550121 (Az. Disp. Com.), which found a member of the Arizona State Bar in violation of the second prong of Ethical Rule 4.4(a) (which prohibits utilizing methods of obtaining evidence that violate the legal rights of such person) for actions very similar to those before this Court.

2. <u>The State has standing to object to the subpoenas duces tecum.</u>

a.) The state cases cited by Defendant are inapplicable.

Defendant asserts the State has no standing to object to the subpoenas duces tecum because they were served on third parties. In attempting to support this argument, Defendant cites to several Arizona cases, all of which are irrelevant because they are civil not criminal cases, and in two of which the party was found to have standing. The first two cases cited, *Lipschultz v. Superior Court,* 128 Ariz. 16, 623 P.2d 805 (1981), and *Humana Hospital Desert Valley v. Superior Court,* 154 Ariz. 396, 742 P.2d 1382 (1987), addressed whether defendant doctors in medical malpractice lawsuits had standing to object to subpoenas addressed to third

parties[1] based on privilege. In each case, the doctors were found to have standing to object to the subpoenas pursuant to a privilege. The third Arizona case cited, *McDonald v. Hyder,* 12 Ariz. App. 411, 471 P.2d 296 (1970), involved a civil personal injury suit wherein the defendants subpoenaed the state compensation fund to appear for the taking of a pretrial deposition and to produce records pertaining to one of the plaintiffs, pursuant to Rule 45, Ariz. R. Civ. P. The plaintiffs objected and the Court found the plaintiff, who was not a party to the subpoena, did not have standing to object under the procedures set forth in the **Rules of Civil Procedure.** The State has not based its objection on any civil procedural rule. This is a criminal prosecution and the issue raised is specifically addressed by Rule 15(g) of the Arizona Rules of Criminal Procedure, A.R.S. § 13-4071, and *Carpenter v. Superior Court, supra,* 176 Ariz. 286, 862 P.2d 246.

b.) The federal cases cited by Defendant reflect the minority view.

Similarly the federal cases cited by Defendant are misleading as presented to this Court. While it is true that the cases cited by Defendant accurately reflect the conclusion therein that the government may lack standing to challenge a subpoena duces tecum issued to a third party, the cases summarize the holdings of the ***minority*** of the courts that have examined the issue. As noted by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Lam,* 444 Mass. 224, 827 N.E.2d 209 (2005), the ***majority*** of federal courts that have considered the issue under the federal rules "have allowed the government to challenge the issuance of subpoenas duces tecum to third parties." *Id.* at 228-229, 827 N.E.2d at 213-214. As in the instant case, the defendant in *Lam* cited to both *United States v. Nachamie,* 91 F.Supp.2d 552, 558-561 (S.D.N.Y. 2000) and *United States v. Tomison,* 969 F.Supp. 587, 596 (E.D.Cal. 1997) to support his claim. The

[1] In *Lipschultz,* the subpoenas were issued to the Board of Medical Examiners and sought privileged investigative reports. In *Humana,* the subpoenas were issued to nonparty hospitals

Massachusetts high court declined to find these cases controlling and concluded that "at least in the context of this case, that we must follow **the clear majority rule allowing the government standing.**" *Id.* at 229, 827 N.E.2d at 214 (emphasis added).

The court in *Lam* based its conclusion on the same argument set forth by the State in the instant case. This argument, which Defendant claims has no support in the law, is the assertion that the State, as a party to the case, has an interest in ensuring compliance with the rules of criminal procedures. *Id.* at 228-229, 827 N.E.2d at 213-214. This interest is a two-way street. A defendant, as a party in the criminal case, shares an equivalent interest in ensuring the State abide by the rules of criminal procedure. *See Commonwealth v. Odgren,* 455 Mass. 171, 176-177, 915 M.E.2d 215, 220 (2009) (Defendant, as a party to a criminal case, "has a special concern with insuring that the Commonwealth abide by the rules of criminal procedure...." *See also State v. Barreiro,* 432 So.2d 138, 139 n.1 (Fla.Dist.Ct.App. 1983) ("[Defendant] has standing to move to quash a subpoena duces tecum served on a third party based on his status as a defendant complaining of a violation of the criminal procedure rules.")

c) The Court, on its own, has an interest in ensuring the rules are followed.

The reality is standing is really a "non-issue." As the court noted in *United States v. Wittig,* 250 F.R.D. 548 (D. Kan. 2008):

> More importantly, standing is really a non-issue in this case because the Court "has an interest in preserving the proper procedure prescribed by the Rules of Criminal Procedure, irrespective of the desires of the parties." The Court must ensure that Rule 17(c) does not become a means of conducting general discovery, which is not permitted in criminal cases. Regardless of the government's position, the Court is required to examine the subpoena for compliance with the test set forth in *Nixon.* The government's standing to object has no effect on the Court's independent obligations under Rule 17(c).

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and sought credential committee evidence protected by peer review privilege.

Id. at 551.

It is only through the procedures set forth in Rule 15.1(g), Ariz. R. Crim. P., that the Court is able to exercise its obligation to ensure any subpoena, whether issued by the State or Defendant, "does not become a means of conducting general discovery." The State has never argued Defendant may never be able to obtain a subpoena duces tecum. It is only asking that any request for such be submitted to this Court by motion pursuant to Rule 15.1(g).

3. Rule 15.1(g) provides the procedure to be followed when the materials sought are not subject to the prosecutor's control.

Defendant's claim that Rule 15(g), Ariz. R. Crim. P., does not apply to "third parties who are neither State agents nor governmental agencies under the prosecution's direction or control" was also addressed by the Court of Appeals in *Carpenter v. Superior Court, supra,* 176 Ariz. 286, 862 P.2d 246. when it noted the following:

> Under Rule 15.1.e[2], the court can order "any person" to make available needed materials or information, assuming a defendant makes the showing required by the terms of the rule. Under any reasonable interpretation of petitioners' discovery request, the court could have made the information sought available pursuant to Rule 15.1.e. We therefore conclude that, even if the information this defendant sought is not encompassed within the mandatory disclosure provisions of Rule 15, the rules provide an adequate means for obtaining needed information.

Id. at 490-491, 862 P.2d at 250 – 251 (internal citations omitted). As noted by the Court, this provision recognizes "the possibility that in exceptional cases, such as those in which **a private party or governmental agency not subject to the prosecutor's control** possesses evidence material to the case, additional materials may exist that should be discoverable by the defendant. **In such cases, Rule 15.1(e) provides the procedure for obtaining needed materials.**" *Id.* at 489, 862 P.2d at 249 (emphasis added).

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[2] This provision is now found in Rule 15.1(g), Ariz. R. Crim. P.

Instead of citing to the above discussion which is clearly on point, Defendant focuses on the portion of *Carpenter* vacating the trial court's order "precluding the entire Public Defender's Office from directing any subpoena duces tecum to any third party." *Id.* at 488, 862 P.2d at 248. However, this excerpt cannot be construed to support Defendant's failure to comply with the Rule 15.1(g). Instead the Court's action was based "on the grounds that the trial court's order was overbroad and usurped the Arizona Supreme Court's rule-making authority established by Ariz. Const. art. VI, § 5 subsec.5." *Id.* As noted above, the Court explicitly acknowledged Rule 15.1(g) provides the procedure for obtaining materials not subject to the prosecutor's control and must be followed in criminal cases.

Finally, Defendant dismisses the plain language set forth in A.R.S. § 13-4071(D) prohibiting the use of blank subpoenas to procure discovery in a criminal case by stating categorically that "Section 13-4071 does not eliminate subpoenas duces tecum in criminal matters." However, a review of the legislative history of the statute indicates that is exactly what the legislature intended to do. The statute was amended to include the prohibition in 2006 by Senate Bill (S.B) 1093.

Attached as Exhibit B is S.B. 1093 as introduced, the initial Fact Sheet for S.B. 1093, the House Amendments to S.B. 1093, S.B. 1093 as passed by the House, the Final Fact Sheet for S.B. 1093 and the Bill as it was approved by the Governor. As noted in these documents, the original bill only prohibited the use of blank subpoenas from being used to access most of the private records of a victim. The House Amendment expanded the prohibition to **all discovery** in a criminal case to include accessing the records of a victim. Based on these documents it is clear

that in amending A.R.S. § 13-4071, the legislature intended a blanket prohibition on the use of subpoenas to obtain discovery in a criminal case.[3]

Finally, the State would note Defendant issued the subpoenas in this case to obtain the medical records of victims. Under Article 2, § 2.1(5) of Arizona Constitution and Rule 39(a)(11), Ariz. R. Crim. P., a victim has a right to refuse a discovery request by a defendant. It was this right that the legislature was attempting to protect when it introduced S.B. 1093 and these rights were, in fact, violated by Defendant's actions in seeking these records without the approval of this Court.

RESPECTFULLY submitted this 22nd day of April, 2010.

By Sheila Sullivan Polk
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By: Kathy Durrer

[3] There are statutes that authorize the State's use of subpoenas duces tecum in the criminal setting. *See* A.R.S. § 13-1812(A) authorizing the State to issue subpoena duces tecum to financial institutions in the investigation or prosecution of specified offenses; *see also* A.R.S. § 13-3018 authorizing the State to issue subpoena duces tecum to communication service providers under certain circumstances.

Exhibit A

Disciplinary Commission Report
In the Matter of a Member of the State Bar
of Arizona, Michael L. Freeman, Respondent
December 19, 2008

2008 WL 6550121
2008 WL 6550121 (AZ.Disp.Com.)
(Cite as: 2008 WL 6550121 (AZ.Disp.Com.))

Supreme Court Disciplinary Commission
State of Arizona

*1 IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, MICHAEL L. FREEMAN, RESPONDENT
No. 06-2029
December 19, 2008

Filed: December 19, 2008

DISCIPLINARY COMMISSION REPORT

This sealed [FN1] matter first came before the Disciplinary Commission of the Supreme Court of Arizona on August 9, 2008, pursuant to Rule 58(e), Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed June 11, 208, recommending dismissal. Based on **Carpenter v. Superior Court, 176 Ariz. 286, 862 P.2d 246 (App. 1993)**, the Commission reversed the Hearing Officer's conclusion that the State Bar did not prove by clear and convincing evidence that Respondent violated the second prong of 4.4(a) (utilized methods of obtaining evidence that violated the legal rights of such person) and remanded this matter for consideration of Respondent's mental state, the presence of any aggravating or mitigating factors, whether Respondent violated ER 8.4(d) (conduct prejudicial to the administration of justice), and the appropriate sanction. See Commission Report filed August 13, 2008. Thereafter, an Agreement for Discipline by Consent was filed on October 16, 2008, however, no hearing was held on the Agreement.

The matter again came before the Disciplinary Commission on December 13, 2008 for consideration of the Hearing Officer's Report filed October 28, 2008, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum in Support of Agreement for Discipline by Consent providing for censure, two years of probation with the State Bar's Law Office Management Assistance Program ("LOMAP")including a practice monitor, six hours of continuing legal education ("CLE") on victims' rights, and costs of these disciplinary proceedings and costs.

Decision

Having found no facts clearly erroneous, the six members [FN2] of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, two years of probation (LOMAP) and costs, including any costs incurred by the Disciplinary Clerk's office. [FN3] The terms of probation are as follows:

Terms of Probation

1. Respondent shall contact the Director of LOMAP within 30 days from the date of the final Judgment and Order.

2. Respondent shall submit to a LOMAP examination of his office's practices and procedures, relating to, among other things, correctly filling out discovery subpoenas and giving notice to all parties affected by discovery subpoenas.

3. The Director of LOMAP shall develop written "Terms and Conditions of Probation" the provisions of which shall be incorporated herein by reference.

4. The "Terms and Conditions of Probation" shall include retention of a practice monitor to supervise Respondent's compliance with criminal discovery rules of procedures. Respondent may suggest a practice monitor for State Bar approval and such approval shall not be unreasonably withheld.

***2** 5. The period of probation will begin to run at the time of the judgment and order, and will conclude two years from the date that all parties have signed the "Terms and Conditions of Probation".

6. Respondent shall be responsible for any costs associated with LOMAP.

7. Respondent shall attend a CLE program relating to the Arizona Constitution's Victims' Bill of Rights. The CLE program must qualify for at least six CLE credit under Rule 45, Ariz.R.Sup.Ct., and associated regulations. Respondent shall be responsible for the cost of attending the program and for producing satisfactory proof of attendance.

8. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

9. In the event that Applicant fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the imposing 20 entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The Hearing 21. Officer shall conduct a hearing within 30-days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

Jeffrey Messing

Vice-Chair

Disciplinary Commission

EXHIBIT A

HEARING OFFICER'S FINDINGS AND RECOMMENDATION
PROCEDURAL HISTORY

This case has a complex procedural history, and a recitation of all the prior pleadings would be needlessly time consuming and ultimately pointless. Fortunately, the prior ruling of the Disciplinary Commission limits the scope of this determination and recommendation.

The formal complaint was filed on August 7, 2007, alleging that Respondent violated Rule 42, Ariz.R.Sup.Ct, ERs 3.4(c), 4.4(a), 8.4(c) and 8.4(d). Respondent's answer was filed on September 2, 2007. A hearing was held on April 3, 2008. The Hearing Officer filed her report on June 11, 2008, containing Findings of Fact and Conclusions of Law in which it was held that Respondent committed none of the violations charged and recommended dismissal of the complaint. The State Bar appealed the Conclusions of Law to the Disciplinary Commission. On August 13, 2008 the Commission unanimously accepted the Hearing Officer's findings and recommendations, except for that portion relating to "the second prong of ER 4.4(a); ("[o]r to use methods of obtaining evidence that violated the legal rights of such a person.") The Commission remanded the matter to a new hearing officer to be appointed (since the hearing officer who conducted the case up to that point was no longer hearing cases), to determine whether the Respondent violated ER 8.4(d), and to make findings as to Respondent's mental state, the presence of any aggravating and/or mitigating factors, and to make a recommendation as to any appropriate sanction.

***3** On October 16, 2008 the Respondent and the State Bar submitted their Tender of Admissions and Agreement for Discipline by consent and their Joint Memorandum in Support of Agreement for Discipline by Consent.

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice in the State of Arizona, having been first admitted to practice in 1986. Respondent has been a certified specialist in criminal law continuously since 2000.

2. Respondent was retained to represent criminal defendant Jay Style in connection with a charge accusing him of sexually molesting his 10 year-old step-granddaughter (hereafter, "Minor").

3. Respondent learned that Minor had obtained psychological counseling and sought her treatment records.

4. The State, the Minor and Minor's mother refused to produce the records, basing their abjection on the Arizona Constitution's Victims' Bill of Rights (Ar-

iz.Const.,Art.II, § 2.1, the Victims' Bill of Rights Enabling Statutes (A.R.S. § 13 4401, et seq.) and Rule 39, Ariz.R.Crim.P.

5. Respondent filed a motion asking the trial court for its order compelling the State to produce Minor's counseling records.

6. The State objected, stating that it did not have the records to produce, and Minor and Minor's mother objected to Respondent's request, asking the court to deny the motion.

7. The trial court denied Respondents motion to compel the State to obtain and produce the records.

8. While Respondent's Motion for Reconsideration of this denial was pending, Respondent served Minor's counselor with a subpoena duces tecum for the records, without notice to the State, the Minor or Minor's representative.

9. In the Disciplinary Proceedings herein, there existed a legal dispute as to whether the holding of **Carpenter v. Superior Court, 176 Ariz. 486, 862 P2d 246 (App. 1993)** required Respondent to give notice to the State and Minor or Minor's representative prior to attempting to obtain the records through a subpoena, and whether Respondent was permitted to subpoena such records absent an accompanying Court Order issued pursuant to Rule 15.1(g), Ariz.R.Crim.P.

10. After consulting with its own legal counsel, the counseling agency complied with the subpoena and produced the records to Respondent. Respondent then produced them to the State.

11. By obtaining Minor's counseling records through the use of a subpoena duces tecum in the absence of a Court Order issued pursuant to Rule 15.1 (g), Respondent used "methods of obtaining evidence that violated the rights" of the Minor victim.

CONDITIONAL ADMISSIONS

1. Respondent conditionally admits that there is clear and convincing evidence that he violated the second prong of ER 4.4(a) when, in representing his client, he used methods of obtaining evidence that violated the legal rights of another person.

2. The State Bar of Arizona conditionally admits that there is no clear and convincing evidence that Respondent violated ERs 3.4(c), 8.4(a), 8.4(c) and the first prong of ER 4.4(a), and further conditionally dismisses the ER 8.4(d) charge in exchange for this consent.

***4** Respondent's admissions are being tendered in exchange for the form of discipline set forth below.

SANCTIONS AND SANCTION ANALYSIS

In general terms, the State Bar and Respondent agree that the Respondent will receive a censure, with two years probation, CLE on Victims' Rights and payment of the costs and expenses of the disciplinary proceedings.

In determining the appropriate sanction, the Hearing Officer, the Disciplinary Commission and the Supreme Court consider the American Bar Association's Standards *for Imposing Lawyer Sanctions* ("Standards") and *Arizona case law*. Factors to be considered include the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and/or mitigating factors.

The parties agree that the misconduct in this case was the Respondent's use of a subpoena duces tecum to obtain evidence that violated the legal rights of the Minor. It is agreed that the following Standards as they relate to the ER in question, 4.4(a) (Respect for Rights of Others) apply.

Standard 6.2 Abuse of the Legal Process

...
6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule and causes injury or potential injury to ... a party, ... 6.23 Reprimand [censurer in Arizona] is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a[n] ... other party, ...

Based on the conditional admissions herein, and the above noted presumptive sanctions, Respondent's misconduct could be suspension or censure.

The following must therefore be considered.

a. The duty violated

Respondent conditionally admits that he violated a rule relating to respect for the rights of others, specially the Minor victim, and also conditionally admits he violated a duty owed to the legal system.

b. The lawyer's mental state

The parties agree that Respondent's conduct was either "knowing" or "negligent". Were this matter to proceed to a sanction hearing, the State Bar would argue that Respondent's interpretation of Rule 15.1(g) Ariz.R.Crim.P. and **Carpenter v. Superior Court, supra**, was so anachronistic (i.e., in order to obtain court authority to issue a subpoena for Minor's treatment records, he first had to seek the records without court authority, and fail to obtain them) as to create an inference that he acted "knowingly" (i.e., with conscious awareness that he violated rules of criminal discovery in violation of a victim's rights). However, in its

report, the Discipline Commission described Respondent's argument on this point as "unreasonable". This implied that Respondent deviated from the standard of care that a reasonable lawyer would have exercised in the situation, which is the norm for "negligence".

c. The extent of actual or potential injury

***5** The parties agree that Respondent's conduct caused actual harm to the Minor and her family in the form of a breach of their rights of privacy. Respondent relied on A.R.S. § 13-3620(k) in concluding that the records obtained were expressly exempted from any legal privilege.

d. Aggravating circumstances

The parties agree that the following factors should be considered as aggravating.

Standard 9.22(a), prior disciplinary offenses

1. Order of Informal Reprimand from the Probable Cause Panelist, filed June 1,1994 in File No. 94-0049. Probable cause existed for Respondent's knowing conduct with a victim in a criminal case in violation of the Victims' Bill of Rights, specifically Rule 42, ER 3.4(c) Ariz.R.Sup.Ct.

2. Order of Informal Reprimand and one year of Probation from the Probable Cause Panelist, filed July 23, 1996, in File No. 95-1502. Probable cause existed because Respondent made contact with a victim in contravention of a court order and the Victim Rights Act on which the order was based. This conduct was in violation of Rule 42, ER 3.4(c) and Rule 51(e), Ariz.R.Sup.Ct.

3. Order of Diversion with LOMAP from the Probable Cause Panelist, Conflict Case Committee, filed January 13, 2004 in File No. 02-0434. Respondent violated Rule 42. Ariz.R.Sup.Ct., including ERs 1.2, 1.3, 3.2 and 8.4(d).

4. Order of Diversion with LOMAP from the Probable Cause Panelist Conflict Case Committee, filed January 13, 2004 in File No. 03-0168. Respondent violated Rule 42, Ariz.R.Sup.Ct. and ERs 1.15 and Rules 43(a), Rule 43(d) and Rule 44.(b).

Standard 9.22(c) a pattern of misconduct

The two Orders of Informal Reprimand, above, involved violations of the Victims' Rights Act, as did Respondent's conduct in this matter.

Standard 9.22 (i), substantial experience in the practice of law

Respondent was admitted to the practice of law in 1985. The State Bar has submitted that the following factors should also be considered in aggravation:

Standard 9.22(g) refusal to acknowledge wrongful nature of conduct

Standard 9.22(h) vulnerability of victim

e. Mitigating circumstances

Standard 9.32(b) absence of a dishonest or selfish motive
Standard 9.32(e) full and free disclosure to a disciplinary board or Cooperative attitude toward proceedings
Standard 9.32(m) remoteness of prior offenses

PROPORTIONALITY

The purpose of discipline is to protect the public and the administration of justice, rather than to simply punish the lawyer for wrongful conduct. Part of the process to achieve this is to attempt to attain internal consistency with cases that are factually similar, while tailoring the discipline in each case to the individual facts and circumstances.

In In re Edelman, SB-04-0152-D the Respondent, a public defender, spoke to a represented person in a criminal matter without permission from that person's attorney and prepared an affidavit for the represented person to sign. Respondent was charged with violating ER 4.4 in addition to ERs 4.2 and 8.4(d). There were two factors in aggravation, 9.22(a) and 9.22; both present in this case; and three factors in mitigation; 9.32(b) and (e), both present here, as well as 9.32(1) [remorse]. The mental state was "negligent" and the injury was potential rather than actual as here. The parties agreed to a censure which was sustained by the Commission. This was the only case offered which involved a criminal attorney abusing process to aid his client's defense. The other cited cases essentially involved civil "abuse of process" by an attorney in representing his client and causing injury to another party or person, apparently by causing the affected person to expend money or time in responding to the abusive process. The cited In re Doyle, SB-06-0048-D matter is so completely different in its facts and allegations that it cannot be considered for proportionality at all.

FINDINGS AND CONCLUSION

***6** Here we have a unique case of a lawyer facing a head on conflict between constitutional rights; the right of his client to a full and complete defense, and the rights of the victim under specific constitutional guidelines. The Respondent simply chose to ignore the victim's rights and to set himself up as the sole judge of how that conflict should be resolved. Case law in Arizona clearly points out that the trial judge can act as a fair arbitrator of these conflicting rights, while attempting to protect all involved. A judge in a criminal case has the right and duty to protect all rights in issue, and in a case such as this could have exercised this mandate through an in camera review of the Minor's counseling records or perhaps some closed hearing testimony from the counselor. The material sought could have contained; (1) highly relevant material impeaching the Minor's police

statements; or (2) relevant, but cumulative repetition of the same accusation of the defendant or (3) no inquiry into actual abuse or mention of it by the minor, proving or tending to prove nothing. But in any event, the trial court could have dealt with the information in a way designed to balance the competing interests of the defendant and the victim. State ex rel Romley v. Superior Court (Roper), 172 Ariz. 232, 836 P2d 445 (App. 1992, rev. denied 1992); P.M. v. Gould, 212 Ariz. 541,136 P3d 223 (2006)

Based on the foregoing it is clear that the Respondent's admission that he has violated that portion of ER 4.4 which prohibits the "use [of] methods of obtaining evidence that violates the legal rights of such a person", by clear and convincing evidence, is sufficient to form the basis of so finding this violation and the Admissions and Agreement for Discipline by Consent are accepted.

AGREED SANCTION

It is further found that, based on the foregoing and the two prior informal reprimands for other violations of victim's rights, that the following agreed sanction is appropriate:

1. Respondent shall be censured for violating Rule 42, Ariz.R.Sup.Ct, ER 4.4(a).
2. Respondent shall be placed on probation for two years under the following conditions:
a. Respondent shall contact the Director of the State Bar's LOMAP program within 30 days of the date of final judgment and order.
b. Respondent shall submit to a LOMAP examination of his office's practices and procedures relating to, among other things, correctly filling out discovery subpoenas and giving notice to all parties affected by discovery subpoenas.
c. The Director of LOMAP shall develop written "Terms and Conditions of Probation" the provisions of which shall be incorporated herein by reference.
d. The "Terms and Conditions of Probation" shall include retention of a practice monitor to supervise Respondent's compliance with criminal discovery rules of procedure. Respondent may suggest a practice monitor for State Bar approval and such approval shall not be unreasonably withheld.
***7** e. The probation period will begin to run at the time of the judgment and order, and will conclude two years from the date that all parties have signed the "Terms and Conditions of Probation".
f. Respondent shall be responsible for any costs associated with LOMAP.
g. Respondent shall attend a CLE program relating to the Arizona Constitution's Victims' Bill of Rights. The CLE program must qualify for at least six (6) CLE credit hours under Rule 45, Ariz.R.Sup.Ct., and associated regulations. Respondent shall be responsible for the cost of attending the program and for producing satisfactory proof of attendance.
h. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Ari-

zona.

i. In the event that Respondent fails to comply with any of the foregoing probation terms, and the State Bar receives information thereof, Bar Counsel shall file a Notice of Non-Compliance with the imposing entity pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable date, but in no event later than thirty (30) days following receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove non-compliance by clear and convincing evidence.

3. Respondent shall pay all costs and expenses incurred by the State Bar in this disciplinary proceeding, as provided by the State Bar's statement of costs and expenses, attached hereto as Exhibit A and incorporated herein. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's Office in this matter.

RECOMMENDATION

It is therefore recommended that the Findings and Conclusion, and the Agreed Sanction be adopted by the Disciplinary Commission.

Dated this 27th day of October, 2008

Philip M. Haggerty

Hearing Officer 6K

FN1. The file was sealed in this matter by the original Hearing Officer as confidential information is contained throughout in the record, specifically, references to the minor victim name. See Protective Order filed July 3, 2008.

FN2. Commissioner Horsley did not participate in these proceedings. Commissioners Flores and Todd recused.

FN3. A copy of the Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total $3,061.25.

2008 WL 6550121 (AZ.Disp.Com.)

END OF DOCUMENT

Exhibit B

Legislative History of 2006 Senate Bill 1093
Amending Section 13-4071,
Arizona Revised Statutes, Relating to Subpoenas

REFERENCE TITLE: blank subpoenas; victims; notice

State of Arizona
Senate
Forty-seventh Legislature
Second Regular Session
2006

SB 1093

Introduced by
Senator Huppenthal

AN ACT

AMENDING SECTION 13-4071, ARIZONA REVISED STATUTES; RELATING TO SUBPOENAS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 13-4071, Arizona Revised Statutes, is amended to read:

13-4071. Subpoena; issuance; duty of clerk

A. The process by which attendance of a witness before a court or magistrate is required is a subpoena.

B. The subpoena may be signed and issued:

1. By a magistrate before whom a complaint is laid for witnesses, either on behalf of the state or the defendant.

2. By the county attorney, attorney general, municipal prosecutor or city prosecutor for witnesses to appear before the grand jury, or for witnesses on a complaint, indictment or information to appear before the court in which the complaint, indictment or information is to be heard or tried or by the county attorney, attorney general, municipal prosecutor or city prosecutor for witnesses requested by a grand jury.

3. By the clerk of the court in which an indictment or information is to be tried, or by the clerk as authorized in subsection C.

C. The clerk of the court or the clerk's designee ~~shall upon~~, ON request of the county attorney or attorney general, SHALL issue a subpoena for witnesses to appear before the grand jury, without prior authorization by a grand jury, ~~provided~~ IF all of the following occur:

1. A duly impaneled grand jury is sworn and is in existence at the time of the issuance of ~~such~~ THE subpoena.

2. The county attorney or attorney general designates the subpoena with the standard identifying grand jury number.

3. The county attorney or attorney general reports to the foreman of the grand jury, or in the foreman's absence the acting foreman, the fact of the issuance of the subpoena within ten days following its issuance or, if the grand jury is in recess, at the first succeeding session of the grand jury after the expiration of the ten day period.

4. The county attorney or attorney general reports to the presiding judge of the superior court the fact of the issuance of the subpoena within ten days following its issuance.

D. The clerk ~~shall~~, at any time, ~~upon~~ ON application of the defendant, and without charge, SHALL issue as many blank subpoenas, subscribed by the clerk as clerk, for witnesses as the defendant requires. BLANK SUBPOENAS SHALL NOT BE USED TO ACCESS THE PRIVATE RECORDS OF A VICTIM, EXCEPT THAT RECORDS RELATING TO RECOVERED MEMORIES OR DISASSOCIATED MEMORIES MAY BE SUBJECT TO SUBPOENA ONLY IF THE STATE SEEKS TO INTRODUCE EVIDENCE OF THE VICTIM'S RECOVERED OR DISASSOCIATED MEMORY AND THE RECORDS ARE NOT OTHERWISE PRIVILEGED. THE VICTIM SHALL BE GIVEN NOTICE OF AND THE RIGHT TO BE HEARD AT ANY PROCEEDING INVOLVING A SUBPOENA FOR RECORDS OF THE VICTIM.

Assigned to JUD FOR COMMITTEE

ARIZONA STATE SENATE

Forty-seventh Legislature, Second Regular Session

FACT SHEET FOR S.B. 1093

blank subpoenas; victims; notice

Purpose

Prohibits blank subpoenas from being used to access most of the private records of a victim.

Background

Subpoenas

The process by which attendance of a witness before the court or magistrate is required is a subpoena (A.R.S. § 13-4071). A witness may be called as a custodian of records, and thus a subpoena may also be used to compel the production of documents. At any time, the clerk of the court must issue as many blank subpoenas for witnesses as the defendant requires, free of charge. Blank subpoenas are signed by the clerk of the court, but the defendant must fill in the necessary information, such as the witness's name and the time the witness is required to appear.

Victims' Rights

In 1990, Arizona voters passed Proposition 104, a ballot initiative amending the State Constitution, providing for a Victims' Bill of Rights. In 1991, the Arizona Legislature passed statutes to define and implement the rights accorded to victims of crime under Article II, Section 2.1 of the Arizona Constitution. These rights include, among other things, the right to be treated with fairness, respect and dignity, and to be free from intimidation, harassment or abuse, throughout the criminal justice process; the right to be informed of victims' constitutional rights; the right to be heard at any proceeding involving a post-arrest release decision, a negotiated plea and sentencing; and the right to a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence. Additional rights are contained in Arizona Revised Statues, Title 13, Chapter 40. Recent legislation has expanded the amount of victim participation in the criminal trial, the ability of the victim to participate in appellate and post-conviction proceedings and victim notification of certain proceedings or occurrences, including probation modification hearings. Currently, prosecutors are responsible for informing victims of their rights according to Rule 39 of the Arizona Rules of Criminal Procedure.

There is no anticipated fiscal impact associated with this legislation.

Provisions

1. Prohibits blank subpoenas from being used to access the private records of a victim.

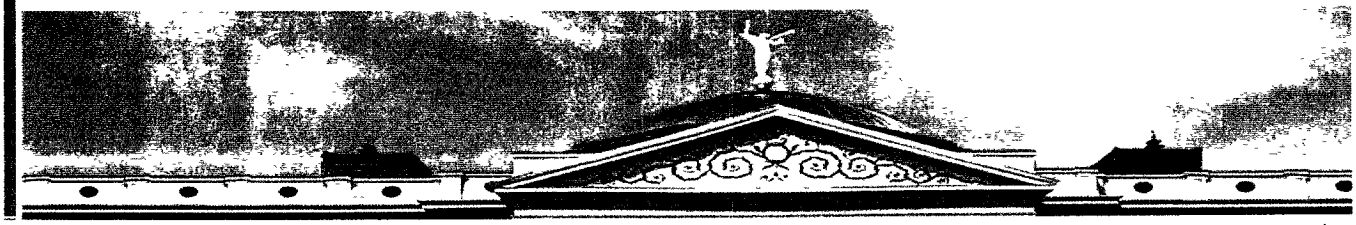
2. Permits blank subpoenas to be used to obtain records relating to recovered memories or disassociated memories, if the state will introduce evidence of the victim's recovered or disassociated memory and the records are not privileged.

3. Requires victims to be given notice of and the right to be heard at any proceeding involving a subpoena for the victim's records.

4. Makes technical changes.

5. Becomes effective on the general effective date.

Prepared by Senate Research
January 12, 2006
JE/ac



ARIZONA STATE SENATE
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TO: SENATOR JOHN HUPPENTHAL

DATE March 31, 2006

SUBJECT House Changes to S B. 1093 – blank subpoenas, victims, notice

As passed by the Senate, S B 1093 prohibits blank subpoenas from being used to access the records of a victim, except for records relating to recovered or disassociated memories that are not privileged and the state seeks to introduce into evidence.

The House amended the bill as follows.

1 Expands the prohibition on the use of a blank subpoena so that blank subpoenas may not be used procure discovery in a criminal case, which includes accessing the records of a victim

2 Specifies that blank subpoenas may be used to obtain records relating to recovered memories or disassociated memories if, in addition to other requirements, the court approves the subpoena after a hearing.

Senate Action				House Action			
JUD	1/30/06	DPA	7-0-1-0	JUD	3/9/06	DP	7-1-0-1
3rd Read	2/16/06		28-0-2-0	3rd Read	3/30/06		56-3-1-0

JE/ac
cc: All Senators

House Engrossed Senate Bill

State of Arizona
Senate
Forty-seventh Legislature
Second Regular Session
2006

SENATE BILL 1093

AN ACT

AMENDING SECTION 13-4071, ARIZONA REVISED STATUTES; RELATING TO SUBPOENAS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 13-4071, Arizona Revised Statutes, is amended to read:

13-4071. Subpoena; issuance; duty of clerk

A. The process by which attendance of a witness before a court or magistrate is required is a subpoena.

B. The subpoena may be signed and issued:

1. By a magistrate before whom a complaint is laid for witnesses, either on behalf of the state or the defendant.

2. By the county attorney, attorney general, municipal prosecutor or city prosecutor for witnesses to appear before the grand jury, or for witnesses on a complaint, indictment or information to appear before the court in which the complaint, indictment or information is to be heard or tried or by the county attorney, attorney general, municipal prosecutor or city prosecutor for witnesses requested by a grand jury.

3. By the clerk of the court in which an indictment or information is to be tried, or by the clerk as authorized in subsection C.

C. The clerk of the court or the clerk's designee ~~shall upon~~, ON request of the county attorney or attorney general, SHALL issue a subpoena for witnesses to appear before the grand jury, without prior authorization by a grand jury, ~~provided~~ IF all of the following occur:

1. A duly impaneled grand jury is sworn and is in existence at the time of the issuance of ~~such~~ THE subpoena.

2. The county attorney or attorney general designates the subpoena with the standard identifying grand jury number.

3. The county attorney or attorney general reports to the foreman of the grand jury, or in the foreman's absence the acting foreman, the fact of the issuance of the subpoena within ten days following its issuance or, if the grand jury is in recess, at the first succeeding session of the grand jury after the expiration of the ten day period.

4. The county attorney or attorney general reports to the presiding judge of the superior court the fact of the issuance of the subpoena within ten days following its issuance.

D. The clerk ~~shall~~, at any time, ~~upon~~ ON application of the defendant, and without charge, SHALL issue as many blank subpoenas, subscribed by the clerk as clerk, for witnesses as the defendant requires. BLANK SUBPOENAS SHALL NOT BE USED TO PROCURE DISCOVERY IN A CRIMINAL CASE, INCLUDING TO ACCESS THE RECORDS OF A VICTIM. RECORDS RELATING TO RECOVERED MEMORIES OR DISASSOCIATED MEMORIES MAY BE SUBJECT TO SUBPOENA ONLY IF THE STATE SEEKS TO INTRODUCE EVIDENCE OF THE VICTIM'S RECOVERED OR DISASSOCIATED MEMORY, THE RECORDS ARE NOT OTHERWISE PRIVILEGED AND THE COURT APPROVES THE SUBPOENA AFTER A HEARING. THE VICTIM SHALL BE GIVEN NOTICE OF AND THE RIGHT TO BE HEARD AT ANY PROCEEDING INVOLVING A SUBPOENA FOR RECORDS OF THE VICTIM FROM A THIRD PARTY.

Assigned to JUD
ENACTED

AS

ARIZONA STATE SENATE

Forty-seventh Legislature, Second Regular Session

FINAL AMENDED
FACT SHEET FOR S.B. 1093

blank subpoenas; victims; notice

Purpose

Prohibits blank subpoenas from being used to procure discovery in a criminal case, including access to most of a victim's records.

Background

Subpoenas

The process by which attendance of a witness before the court or magistrate is required is a subpoena (A.R.S. § 13-4071). A witness may be called as a custodian of records, and thus a subpoena may also be used to compel the production of documents. At any time, the clerk of the court must issue as many blank subpoenas for witnesses as the defendant requires, free of charge. Blank subpoenas are signed by the clerk of the court, but the defendant must fill in the necessary information, such as the witness's name and the time the witness is required to appear.

Victims' Rights

In 1990, Arizona voters passed Proposition 104, a ballot initiative amending the State Constitution, providing for a Victims' Bill of Rights. In 1991, the Arizona Legislature passed statutes to define and implement the rights accorded to victims of crime under Article II, Section 2.1 of the Arizona Constitution. These rights include, among other things, the right to be treated with fairness, respect and dignity, and to be free from intimidation, harassment or abuse, throughout the criminal justice process; the right to be informed of victims' constitutional rights; the right to be heard at any proceeding involving a post-arrest release decision, a negotiated plea and sentencing; and the right to a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence. Additional rights are contained in Arizona Revised Statues, Title 13, Chapter 40. Recent legislation has expanded the amount of victim participation in the criminal trial, the ability of the victim to participate in appellate and post-conviction proceedings and victim notification of certain proceedings or occurrences, including probation modification hearings. Currently, prosecutors are responsible for informing victims of their rights according to Rule 39 of the Arizona Rules of Criminal Procedure.

There is no anticipated fiscal impact associated with this legislation.

Provisions

1. Prohibits blank subpoenas from being used to procure discovery in a criminal case, including access to the records of a victim.

2. Permits blank subpoenas to be used to obtain records relating to recovered memories or disassociated memories, if the state will introduce evidence of the victim's recovered or disassociated memory, the records are not privileged and the court approves the subpoena after a hearing.

3. Requires victims to be given notice of and the right to be heard at any proceeding involving a subpoena for the victim's records from a third party.

4. Makes technical changes.

5. Becomes effective on the general effective date.

Amendments Adopted by Committee

- Specifies that the victim be given notice and the right to be heard only at a proceeding involving a subpoena requesting the victim's records from a third party.

Amendments Adopted by the House of Representatives

1. Expands the prohibition on the use of a blank subpoena to criminal discovery.

2. Specifies that in order for a blank subpoena to be used to obtain records relating to recovered or disassociated memories, the court must approve the subpoena after a hearing.

Senate Action				House Action			
JUD	1/30/06	DPA	7-0-1	JUD	3/9/06	DP	7-1-0-1
3rd Read	2/16/06		28-0-2-0	3rd Read	3/30/06		56-3-1-0
Final Read	4/4/06		29-0-1-0				

Signed by the Governor 4/10/06
Chapter 79

Prepared by Senate Research
April 13, 2006
JE/ac

Westlaw

AZ LEGIS 79 (2006)
2006 Ariz. Legis. Serv. Ch. 79 (S.B. 1093) (WEST)
(Publication page references are not available for this document.)

ARIZONA 2006 LEGISLATIVE SERVICE
Second Regular Session of the Forty-Seventh Legislature

Additions are indicated by **Text**; deletions by ~~Text~~. Changes in tables are made but not highlighted.

CHAPTER 79
S.B. 1093
SUBPOENAS

AN ACT AMENDING SECTION 13-4071, ARIZONA REVISED STATUTES; RELATING TO SUBPOENAS.

Be it enacted by the Legislature of the State of Arizona:
Section 1. Section 13-4071, Arizona Revised Statutes, is amended to read:

<< AZ ST § 13-4071 >>
§ 13-4071. Subpoena; issuance; duty of clerk

A. The process by which attendance of a witness before a court or magistrate is required is a subpoena.

B. The subpoena may be signed and issued:

1. By a magistrate before whom a complaint is laid for witnesses, either on behalf of the state or the defendant.

2. By the county attorney, attorney general, municipal prosecutor or city prosecutor for witnesses to appear before the grand jury, or for witnesses on a complaint, indictment or information to appear before the court in which the complaint, indictment or information is to be heard or tried or by the county attorney, attorney general, municipal prosecutor or city prosecutor for witnesses requested by a grand jury.

3. By the clerk of the court in which an indictment or information is to be tried, or by the clerk as authorized in subsection C.

C. The clerk of the court or the clerk's designee ~~shall upon~~, **on** request of the county attorney or attorney general, **shall** issue a subpoena for witnesses to appear before the grand jury, without prior authorization by a grand jury, ~~provided~~

if all of the following occur:

1. A duly impaneled grand jury is sworn and is in existence at the time of the issuance of ~~such~~ **the** subpoena.

2. The county attorney or attorney general designates the subpoena with the standard identifying grand jury number.

3. The county attorney or attorney general reports to the foreman of the grand jury, or in the foreman's absence the acting foreman, the fact of the issuance of the subpoena within ten days following its issuance or, if the grand jury is in recess, at the first succeeding session of the grand jury after the expiration of the ten day period.

4. The county attorney or attorney general reports to the presiding judge of the superior court the fact of the issuance of the subpoena within ten days following its issuance.

D. The clerk ~~shall~~, at any time, ~~upon~~ **on** application of the defendant, and without charge, **shall** issue as many blank subpoenas, subscribed by the clerk as clerk, for witnesses as the defendant requires. **Blank subpoenas shall not be used to procure discovery in a criminal case, including to access the records of a victim. Records relating to recovered memories or disassociated memories may be subject to subpoena only if the state seeks to introduce evidence of the victim's recovered or disassociated memory, the records are not otherwise privileged and the court approves the subpoena after a hearing. The victim shall be given notice of and the right to be heard at any proceeding involving a subpoena for records of the victim from a third party.**

Approved by the Governor, April 10, 2006.

Filed in the Office of the Secretary of State, April 10, 2006.

AZ LEGIS 79 (2006)

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